IN THE

Supreme Court of the United States

Term, 1958.

No. 95

HERMAN A. DE POVA,
Plaintiff-Respondent,

v.

CAMDEN FORGE COMPANY,
Defendant-Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondent in Opposition.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

Whether the Court of Appeals erred (a) in awarding a trial on the merits of a claim for an increase in salary plus 10% of the operating profits under an employment contract made on behalf of the employer corporation by the fully authorized chairman of the executive committee and chairman of the Board with a valuable executive employe, and (b) in holding that a New Jersey Statute empowering corporations to provide a plan or plans with employes for acquisition by them of capital stock of the corporation and participation in profits was inapplicable and did not preclude recovery.

STATEMENT.

Petitioner, which had been losing large sums of money, needed a man of special capability to convert petitioner's operation from loss to profit. Petitioner's chairman of the executive committee and chairman of the Board Directors, together, recognizing that respondent was such a man, agreed, on a one year contract, to increase respondent's salary from $20,000. to $35,000. and to give him ten percent of the operating profit, if any, for such period. The chairman of the executive committee had carte blanche authority from the directors and stockholders to employ agents (R. 83a and Petition, p. 26), to do all things that the president was empowered to do (R. 83a) even to the extent of lending the company's money and assets, in his sole discretion, with or without security (R. 84a). During the latter part of the year, and prior to the end of respondent's employment year, but after petitioner's operations had resulted in a very substantial profit, respondent was discharged. Petitioner defended upon the ground that the chairman of the executive committee and the chairman of the Board of Directors had no authority to employ respondent upon the aforesaid terms. The trial court dismissed respondent's complaint at the close of his case primarily for the reason that the trial judge considered the incentive portion of the contract, i. e. ten percent of the operating profits, if any, as extraordinary and outside the regular custom of business and beyond the authority of the officers of the corporation. The Court of Appeals reversed the judgment and remanded the case for a new trial. In the Court of Appeals, petitioner, for the first time, contended that a New Jersey statute (Petition, p. 9) precluded the enforcement of the contract.

The New Jersey statute referred to by the petitioner, by its terms, permits New Jersey corporations to "carry out a plan or plans" for acquisition of its capital stock

by employees and participation by employees in the profits of the corporate enterprise (Petition, p. 9). The same statute provides: "The privileges and powers conferred by this article shall be in addition to and independent of all powers and authority conferred by any other law, and not in restriction or limitation of any of the powers of corporations of this State." (Petition, p. 13.)

The contract of employment was not part of a "plan or plans" and the suit for its enforcement involved no question of acqusition of capital stock. While a promise was made to respondent involving a block of stock, respondent pressed no claim thereon. Judge Madden, the trial judge, said: "There was, likewise, some mention made of an option to be given to the plaintiff on a block of stock with which the plaintiff wasn't concerned at the time, and didn't feel that it entered into his contract. He makes no application for damages in that respect." (Petition, p. 15). In this regard, Judge Goodrich, speaking for the Court of Appeals said: "Birrell approved of the tentative arrangements, expressed pleasure with the plaintiff's conduct of the company affairs and added that the plaintiff should be given some options on stocks in companies that Birrell represented at the time. This last item has no significance in this lawsuit." (Petition, p. 22.)

The Court of Appeals held that the statute did not preclude the enforcement of the agreement sued upon.

ARGUMENT.

I.

Whether directing a trial on the merits to determine the enforceability of a short term incentive contract made by fully authorized corporate officers with an executive employe raises an issue of imperative importance to the entire financial world is the question posed by petitioner. It is submitted that the decison in this case, even when finalized, will not stir the financial world. Moreover the judgment of the Court of Appeals is not a final judgment on the merits and, while a non-final judgment may be reviewed by this Court in a proper case, it has been stated: "... Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. . . ." *Amer. Const. Co. v. Jacksonville Railway*, 148 U. S. 372, 384-385, 37 L. Ed. 486.

Petitioner contends that the decision sought to be reviewed is in conflict wtih the decision of the Court of Appeals of the Fourth Circuit.

To constitute a conflict, the decisions must involve the same matter of law or fact, not merely an inconsistency in dicta or in general principles utilized. *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 392-3, 67 L. Ed. 712, 43 S. Ct. 422; *Keller v. Adams-Campbell Co.*, 264 U. S. 314, 68 L. Ed. 705, 44 S. Ct. 356.

Petitioner relies upon *Penn v. Robertson*, 115 F. 2d 167 (4 Cir. 1940). That case concerned the legality of a stock participation plan. No question of stock participation exists in the case at bar. Neither is the employment contract sued upon a part of any *plan*.

II.

Petitioner asserts that the District Court should have declined jurisdiction, contending that the case involved an important question of local law as to which there was no directly controlling precedent.

This contention is raised here for the first time, never having been raised in the District Court or in the Court of Appeals. It should not be considered by this Court. *United States v. Fleischman*, 339 U. S. 349, 94 L. Ed. 906, 70 S. Ct. 739; *State of California v. Taylor*, 353 U. S. 553, 1 L. Ed. 2d 1034, 77 S. Ct. 1037.

Petitioner cites *Rogers v. Guaranty Trust Co. of New York*, 60 F. 2d 106 (Dist. Ct. S. D. N. Y. 1932), where the District Court in New York declined jurisdiction upon the interpretation of the legality of the Executive Compensation Plan of the American Tobacco Company of New Jersey on the ground that questions involving internal affairs of a corporation should not be decided by a court sitting in a State other than the State in which the corporation is domiciled. The inapplicability of that case is clear. There, in contrast with the case at bar, issuance of stock was involved. There, also, a New York Court refrained from deciding a question involving the internal affairs of a New Jersey Corporation. In the case at bar, assuming, arguendo, relevancy of the subject matter, the District Court of New Jersey, sitting in New Jersey, required to apply New Jersey law, could not properly decline jurisdiction.

III.

Petitioner, in asserting that the "Court of Appeals has decided an important question of state law in a way *probably* in conflict with the law of New Jersey," (emphasis supplied) has failed to advert to pertinent New Jersey cases, among which are *Bennett v. Millville Improvement Co.*, 67 N. J. L. 320, 51 Atl. 706 (E. & A. 1902),

where an agreement for compensation in the form of commission, contingent basis or share in the profits was held proper, and *Eilen v. Tappins, Inc.*, 16 N. J. Superior 53, where additional compensation based upon net profits was approved.

The Court of Appeals said (Petition, p. 25):

> "It is noteworthy that the statutes of New Jersey recognize a public policy in favor of such incentive agreements. They also state a method by which those agreements may be provided in the corporate structure. 14 N. J. S. A. § 19-1 to 5 (1937). It is arguable, although we do not believe soundly, that since the statute prescribes formalities for this type of contract, the statutory procedures must be followed in order to have it. We think such an argument pushes the effect of a permissive statute much too far. It does not follow that because this kind of contract can be made by following one course that it cannot be made by following some other course. And there is good authority recognizing the legality of this type of employee arrangement aside from any statutory authority upon it. See e.g., 5 FLETCHER, PRIVATE CORPORATIONS, § 2143 (rev. vol. 192); *Bennett v. Millville Improvement Co.*, 67 N. J. L. 320, 51 Atl. 706 (E. & A. 1902)."

This court has held that it will ordinarily accept the determination of a Court of Appeals on questions of local law. *General Box Co. v. United States*, 351 U. S. 159, 100 L. Ed. 1055, 76 S. Ct. 728, rehearing denied, 351 U. S. 990, 100 L. Ed. 1502, 76 S. Ct. 1044.

IV.

Contrary to petitioner's statement, it is submitted that this case is not of imperative importance to the entire financial world but is a controversy affecting only the im-

mediate parties. As Judge Goodrich pointed out (Petition, p. 27):

> "We, therefore, do not need to face in this case how far corporate officers may go in making incentive contracts without authorization by the directors. For better or for worse, the by-laws of this corporation representing, of course, corporate action by those who are responsible for its origin, gave the President equal authority with the Board of Directors as to employment. In other words, the President is authorized to do what the Directors can do and, by resolution, the Chairman of the Executive Committee is authorized to do what the President can do. This may or may not be a wise corporate arrangement but it is the arrangement that was made."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HARRY NORMAN BALL,
Counsel for Respondent.